As an agent, has the defendant been negligent in carrying out its function with due care and diligence? There is evidence that D.W.3, the defendant's Field Officer, carried out supervision over the work of both contractors at the site and it was he who certified their works upon which payments were accordingly made. The fact that only 30% of the grants was utilised, bears further testimony that inspection and supervision was carried out by the defendant and that there were other factors contributing to the failure of the project. The main one as disclosed by the evidence is the problem of the goats and buffaloes straying into the scheme and destroying young trees. There is also evidence that some of these animals belong to the plaintiffs themselves and despite warnings being given, that they should keep their animals away from the scheme, the animals continued to enter the area and ravaged the trees. Thus it was the animals also that prevented both contractors from achieving the required number of rubber trees for each acre. Another factor contributing to the failure of the project is the attitude of the plaintiffs themselves in not providing the necessary co-operation when that is most needed in a scheme of this nature. In this case the defendant had done all it was expected to do after the grants were approved. It had provided a contractor when the plaintiffs failed to provide one. Again a second contractor was found when the first one failed to make any headway in the scheme. When again the services of the second contractor was prematurely terminated, the defendant tried to salvage the project by alloting a special fund to rehabilitate the area but even their efforts proved unsuccessful and the main reason why this is so is the plaintiffs' lack of understanding as to how the whole scheme works.

From the pleadings, the defendant is alleged to have breached its statutory duties as laid down under section 6(2) (iii) & (iv) of the Act, but on the evidence, I find that they have not proved this to be so as no contractual relationship exists between them. The Act, the 1952 Ordinance, and the regulations governing the scheme speak only of assistance to be given by the defendant and in this case, the defendant had done just that in making the grants available so that the plaintiffs' lands can be worked and planted with high quality rubber trees. It is not bound by law to make good any loss suffered by any smallholder who has failed to work his land successfully. The fact that this scheme which the plaintiffs had so enthusiastically embarked into was somewhat different from the normal scheme of providing financial assistance to an individual who then works his land as opposed to a group who delegates the work to the defendant does not alter the defendant's position of providing assistance only in the form of either cash or kind and neither has it altered or excluded the active participation of the plaintiffs to the scheme itself. The plaintiffs have also submitted that since they have no privity of contract with the contractors, the defendant must be made to be held responsible and must make amends. I do not consider it is proper to decide this case on such a reasoning as it will amount to a deprived or aggrieved party picking on anybody at random to vent his frustrations on. The plaintiffs have sued the defendant on the grounds of a breach of its statutory duties under the Act and for negligence, but as the evidence does not support such contentions, this action must fail and I accordingly dismiss it with costs.

Claim dismissed.

Solicitors : *Daim & Gamany; K.T. Joseph & Co.*

PUBLIC PROSECUTOR v. YAP HUAT HENG

[A.C.J. (Shaikh Daud J.) April 13, 1985]

[Kuala Lumpur – Federal Territory Criminal Appeal No. 8 of 1985]

Criminal Law and Procedure – Sentence – Rape – Concurrent and consecutive sentences.

Penal Code, ss. 376, 392 & 397 – Rape and robbery – Sentence.

In this case the facts were that the complainant a girl aged 17 years old and her sister aged 13 years old were in their house when four male persons forced themselves into the house. The respondent was one of the four persons. They then threatened and robbed the complainant and her sister of their jewelleries and cash. After that each of the four persons including the respondent took turns and raped both the complainant and her sister. The four persons were subsequently arrested and charged. The three others had been dealt with earlier. The charges against the respondent were two charges of rape and two charges of robbery. The respondent pleaded guilty to all four charges. After hearing the facts and the plea in mitigation, the learned President of the Sessions Court sentenced the respondent to three years' imprisonment on each of the charges and ordered the sentences to run concurrently. The Public Prosecutor appealed.

Held: (1) the sentences imposed by the learned President were not only manifestly inadequate but also wrong in law;

(2) where two or more distinct offence have been committed, sentences of imprisonment should not be made concurrent. It should only be made concurrent when an offender had been convicted of a principal and a subsidiary offence. In all other cases sentences should be made to run consecutively;

(3) in certain specific offences the courts should not place too much emphasis on the fact that the offender is young and a first offender. Public interest demands that in such cases a deterrent sentence ought to be given;

(4) on the 1st charge respondent should be sentenced to imprisonment for a period of five years plus three strokes of the rotan and on the 2nd charge to eight years plus three strokes of the rotan. Both these sentence are to run consecutively. As for the 3rd and 4th charges respondent is sentenced to five years on each charge and this sentence is to run concurrently with the sentences on the 1st and 2nd charges.

Case referred to:

(1) *Tan Bok Yeng* v. *Public Prosecutor* [1972] 1 M.L.J. 214.

CRIMINAL APPEAL.

Tan Hock Chuan (Deputy Public Prosecutor) for the Public Prosecutor.

Respondent in person.

Cur. Adv. Vult.

Shaik Daud J. (delivering oral judgment): This is an appeal by the learned Public Prosecutor against sentence imposed by the Kuala Lumpur Sessions Court. The respondent Yap Huat Heng was charged as follows:

1st charge:

"Bahawa kamu pada 17.3.1983 di antara jam 11.00 malam dengan 12.00 tengah malam di rumah No. 889, Jalan Kuchai Lama, Kuala Lumpur, di dalam Wilayah Persekutuan telah melakukan rogol ke atas seorang perempuan bernama Ng Lai Kuen k/p: No. A.0350541 berumur 17 tahun, dan olih yang demikian kamu telah melakukan satu kesalahan yang bolih dihukum di bawah Seksyen 376 Kanun Keseksaan."

2nd charge:

"Bahawa kamu pada 17.3.1983 di antara jam 11.00 malam dengan 12.00 tengah malam di rumah No. 889, Jalan Kuchai Lama, Kuala Lumpur di dalam Wilayah Persekutuan telah melakukan rogol ke atas seorang perempuan bernama Ng Lee Yen K/p No. A.1507389 berumur 13 tahun, dan olih yang demikian kamu telah melakukan kesalahan yang bolih dihukum di bawah Seksyen 376 Kanun Keseksaan."

3rd charge:

"Bahawa kamu pada 17.3.1983 jam lebih kurang 11.00 malam di rumah No. 889, Jalan Kuchai Lama, Happy Garden, Kuala Lumpur di dalam Wilayah Persekutuan Dengan Niat Bersama di bawah Seksyen 34 Kanun Keseksaan telah samun seorang perempuan Ng Lai Kuen KP: A.0350541, barang-barang kemas iaitu 1 rantai dan cincin emas berharga $280.00 dan dimasa melakukan samun itu kamu telah menggunakan senjata tajam, dan dengan itu kamu telah melakukan satu kesalahan yang bolih dihukum di bawah Seksyen 392 dan 397 Kanun Keseksaan."

4th charge:

"Bahawa kamu pada 17.3.1983 jam lebih kurang 11.00 malam di rumah No. 889, Jalan Kuchai Lama, Happy Garden, Kuala Lumpur di dalam Wilayah Persekutuan Dengan Niat Bersama di bawah Seksyen 34 Kanun Keseksaan telah samun seorang perempuan Ng Lee Yen KP: A.1507389. Barang-barang iaitu 1 rantai dan 1 cincin berwarna emas berharga $21.00, dan di masa melakukan samun itu kamu telah menggunakan senjata tajam, dan dengan itu kamu telah melakukan satu kesalahan yang bolih dihukum di bawah Seksyen 392 dan 397 Kanun Keseksaan,"

On January 2, 1985, the respondent pleaded guilty to all four charges. After hearing the facts and plea in mitigation, the learned President sentenced the respondent to three years' imprisonment on each of the charges and ordered the sentences to run concurrently. In other words for all the four offences the respondent was sentenced to three years. It is against this sentence and order that learned Public Prosecutor now appealed.

The facts of the four charges as adduced at the lower court are that on March 17, 1983 at about 11.00 p.m. while the complainant aged 17 years old and her sister aged 13 years old were in their home at No. 889, Happy Garden, off Jalan Kuchai Lamai, Kuala Lumpur, four male persons forced themselves into the house. The respondent was one of the four persons. They then threatened and robbed the complainant and her sister of their jewelleries and cash valued at $341.00 in total. After that each of the four persons including the respondent took turns and raped both the complainant and her sister. Having satisfied themselves they then left the house. Complainant and her sister later lodged a report.

As a result of information received the police on March 18, 1983 arrested the four suspects who were later identified by complainant and her sister. The police also recovered some jewelleries robbed from both complainant and her sister. All four including respondent were charged. The 3 others had been dealt with earlier.

Punishment in each and every case is one that is dependent upon the view the presiding Magistrate

takes of the facts that had been given both for the prosecution and for the defence. Even in cases where the facts are almost similar or identical one often finds sentences are not so. I must, therefore, in this particular case decide whether the learned President in dealing with the offences had failed to consider the gravity of the offences and the circumstances and manner in which they were committed as well as the public interest.

The respondent or any other offender may be a first offender and young but those factors alone do not entitle him to be treated with leniency. To my mind the need to deter others in the public interest must supersede other considerations. As is well known rape cases are very difficult to prove, and rape victims especially young victims, go through traumatic experience at the time of the offence and later, and also at the trial more often than not they become the accused rather than the accuser. In view of this, to my mind, once such offence is proved the Courts must and should take very serious view and imposed appropriate deterrent sentences. The public would lose confidence in the courts if lenient sentences are meted out for such offences.

I have carefully considered the circumstances in which these offences were committed and in my view nothing could mitigate what the respondent and his friends did to both the girls. Not being satisfied in robbing them at knife point which in itself is serious enough, they then took turns and raped both their victims one by one. The second victim was then only 13 years old. According to the medical report they even passed on an infection to her.

What could possibly mitigate this? The fact that respondent is a first offender and young? I feel that if he is old enough to commit adult offences he should also be deemed to be old enough to take the consequences.

Here I would like to echo what the late Justice Sharma said on sentencing young and first offenders in *Tan Bok Yeng* v. *Public Prosecutor*[1] and I quote:

"I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of the youth alone is capable of performing and producing. Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its result and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society."

In certain specific offences the courts should not place too much emphasis on the fact that the offender is young and a first timer. Public interest demands that in such cases a deterrent sentence ought to be given.

In the circumstances of the present case I am in full agreement with the submission of the learned Deputy Public Prosecutor that the sentence imposed by the learned President was not only manifestly inadequate but also wrong in law. Where two or more distinct offences had been committed, sentences of imprisonment should not be made to run concurrently. It should only be made concurrent when an offender had been convicted of a principal and a subsidiary offence. In all other cases sentences should be made to run consecutively.

In the present case the respondent had been convicted of committing two distinct offences of rape on two separate persons and in the light of that a sentence of 3 years on each charge to be made concurrent is wrong in law.

I would therefore allow the appeal and enhance the sentence as follows:-

On the 1st charge respondent is sentenced to imprisonment for a period of five (5) years plus three (3) strokes of the rotan and on the 2nd charge to eight (8) years plus three (3) strokes of the rotan. Both these sentences are to run consecutively. As for the 3rd and 4th charges, respondent is sentenced to five (5) years on each charge and this sentence is to run concurrently with the sentences on the 1st and 2nd charges.

Appeal allowed, sentence enhanced.